106

(4)

No. 07-1547

Supreme Court, U.S.
FILED
SEP 26 2008
OFFICE OF THE CLERK

# In The
# Supreme Court of the United States

ELIZABETH AGUILERA, et al.,

*Petitioners,*

v.

LEROY BACA, INDIVIDUALLY AND AS SHERIFF OF THE COUNTY OF LOS ANGELES, et al.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF IN OPPOSITION

PAUL B. BEACH
*Counsel of Record*
JIN S. CHOI
LAWRENCE BEACH ALLEN & CHOI, PC
100 West Broadway, Suite 1200
Glendale, California 91210-1219
Telephone (818) 545-1925
*Attorneys for Respondents Leroy Baca, et al.*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTION PRESENTED

Does a public employer violate its employees' Fifth Amendment rights by punishing them for their refusal to provide potentially incriminating testimony in an internal investigation when it did not provide notice that the testimony could not be used against them in criminal proceedings and that they would therefore be subject to administrative discipline if they did not testify?

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| INTRODUCTION | 1 |
| STATEMENT OF THE CASE | 3 |
| I. The Assault Of A Member Of The Public Giving Rise To Petitioners' Suit | 3 |
| II. The Proceedings In The District Court And The Court Of Appeals | 10 |
| REASONS FOR DENYING THE PETITION | 12 |
| I. The Petition Seeks Review Of An Issue Not Raised In This Action | 12 |
| II. This Court Declined To Review This Issue Last Term | 15 |
| III. The Petitioners Were Not Punished For Exercising Their Fifth Amendment Rights | 16 |
| IV. The Decision Below Is Consistent With This Court's Jurisprudence And Does Not Create An Inter-Circuit Conflict That Warrants Review | 21 |
| A. The Court Of Appeals Correctly Held That Petitioners' Fifth Amendment Rights Were Not Violated | 21 |
| B. The Court Of Appeals' Proper Application Of Controlling Precedent And Its Narrowly-Crafted Holding Did Not Create Or Broaden Any Material Inter-Circuit Conflict | 24 |

TABLE OF CONTENTS – Continued

Page

V. Petitioners' Contention That There Is Rampant Confusion About Applying *Garrity* Is Patently Untrue And Contradicted By Four Decades Of Case Law ..... 32

A. Petitioners Have Made Absolutely No Showing That Law Enforcement Officers Who Have Engaged In Criminal Activity Are Escaping Prosecution Because Of Any Purported Confusion Caused By *Garrity* ..... 32

B. Review Is Not Needed To Cure Any Purported Confusion About *Garrity*, As Evidenced By 40 Years Of Case Law And The Lack Of Amicus Support By Agencies Who Prosecute Law Enforcement Officers ..... 33

C. There Is No Compelling Need For This Court To Write Into The Constitution A New Rule, Especially One That Could Have Dire Consequences ..... 34

CONCLUSION ..... 36

## TABLE OF AUTHORITIES

Page

CASES

*Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 122 S.Ct. 511 (2001) ..... 14

*Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598 (1970) ..... 14

*Atwell v. Lisle Park District*, 286 F.3d 987 (7th Cir. 2002) ..... 29

*Butler v. Curry*, 528 F.3d 624 (9th Cir. 1998) ..... 13

*Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 125 S.Ct. 577 (2004) ..... 14

*Dothard v. Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720 (1977) ..... 14

*Dwan v. City of Boston*, 329 F.3d 275 (1st Cir. 2003) ..... 18, 19, 20, 21

*Gardner v. Broderick*, 392 U.S. 273, 88 S.Ct. 1913 (1968) ..... 21, 22, 23, 27

*Garrity v. State of New Jersey*, 385 U.S. 493, 87 S.Ct. 616 (1967) ..... *passim*

*Hill v. Johnson*, 160 F.3d 469 (8th Cir. 1998) ..... 23

*Modrowski v. Dep't of Veterans Affairs*, 252 F.3d 1344 (Fed. Cir. 2001) ..... 26, 27, 28

*Northwest Acceptance Corp. v. Lynnwood Equipment, Inc.*, 841 F.2d 918 (9th Cir. 1988) ..... 13

*Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 118 S.Ct. 1952 (1998) ..... 14

TABLE OF AUTHORITIES – Continued

Page

*Reed-Goss v. Astrue*, 2008 U.S. App. LEXIS 18205 (9th Cir. 2008) ..... 13

*Ritchie v. United States*, 451 F.3d 1019 (9th Cir. 2006) ..... 13

*Sher v. U.S. Department of Veterans Affairs*, 488 F.3d 489 (1st Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S.Ct. 1924 (2008) ..... 15, 16

*Travelers Cas. & Sur. Co. of America v. Pacific Gas & Elec. Co.*, ___ U.S. ___, 127 S.Ct. 1199 (2007) ..... 15

*Uniformed Sanitation Men Association, Inc. v. Commissioner of the City of New York*, 392 U.S. 280, 88 S.Ct. 1917 (1968) ..... 21, 22, 23, 30, 31

*United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870 (1980) ..... 14

*Weston v. Dep't of Hous. & Urban Dev.*, 724 F.2d 943 (Fed. Cir. 1983) ..... 27, 28

*Wiley v. Mayor & City Council of Baltimore*, 48 F.3d 773 (4th Cir. 1995) ..... 23

RULES

Fed. R. App. Proc., Rule 28 ..... 13

Fed. R. App. Proc., Rule 28(a)(5)-(9) ..... 13

Sup. Ct. R. 10 ..... 1

Sup. Ct. R. 10(a)-(c) ..... 1

## INTRODUCTION

Petitioners have presented no "compelling reasons" for their Petition for Writ of Certiorari ("Petition") to be granted. *See* Sup. Ct. R. 10. Specifically, Petitioners have failed to demonstrate that the Court of Appeals' December 27, 2007 Opinion ("Opinion") is in conflict with a decision of this Court or another Court of Appeals or that the Court of Appeals decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). In fact, Petitioners have failed to even establish that the District Court erred in dismissing Petitioners' claims under the Fifth Amendment. Therefore, the Petition should be denied.

The threshold reason for denial of the Petition is that it seeks review of an issue that was never even raised below, in either the District Court or the Court of Appeals. As a result, neither the record nor the arguments on this issue were ever developed below, and should not be developed in the first instance in this Court.

Moreover, the Petition is based on a faulty premise, to wit, that the Petitioners were "punished" for exercising their Fifth Amendment rights. Both the District Court and the Court of Appeals specifically found that Respondents did not punish Petitioners. In fact, the subject job reassignments – temporary until Petitioners could be cleared of wrongdoing – were reasonable and consistent with sound, well-recognized employment practices.

Another reason for denial of the Petition is that the Opinion below does not conflict with this Court's precedent. Nor does it constitute a conflict with the few cases from other Circuits where they have discussed whether and what kind of notice may be necessary when employees refuse to provide compelled statements. Specifically, here, none of the Petitioners were compelled to give statements, and no statements were ever used against them in any criminal proceeding. Moreover, none of the Petitioners were terminated because they refused to provide statements. Thus, none of the cases cited by Petitioners are in conflict with the Panel's Opinion.

Finally, despite the rhetoric in the Petition, there exists no grand confusion amongst public entities or their employees about how to follow this Court's ruling 40 years ago in *Garrity v. State of New Jersey*, 385 U.S. 493, 87 S.Ct. 616 (1967). Over the years, this case has been applied by thousands of public entities without a significant body of cases expressing confusion or calling for clarification. Nor have groups responsible for pursuing police misconduct clamored for guidance from this Court on this issue. In fact, it appears that other than Petitioners, relatively few of the many stakeholders in this field are interested in Petitioners' new proposed constitutional rule which, if enacted, would cause more problems than it would supposedly cure.

In summary, Petitioners have failed to carry their substantial burden of demonstrating that there are

any compelling reasons for this Court to grant the Petition. Accordingly, the Petition should be denied.

## STATEMENT OF THE CASE

### I. The Assault Of A Member Of The Public Giving Rise To Petitioners' Suit.

The events at issue arise out of a narcotics investigation during the early morning hours of September 5, 2002. Supervisors at the Los Angeles County Sheriff's Department, East Los Angeles Station, learned that a member of the public was hospitalized with serious injuries to his head and back due to an assault with a baton or flashlight by a deputy sheriff. (1 ER 12, 79.)[1]

On September 5, 2002, at approximately 1:40 a.m., the victim, Martin Flores, had been a bystander at the scene of a narcotics investigation at a residence adjoining a bar. (1 ER 12, 4 ER 1077.) At the scene where the assault took place were six deputy sheriffs[2] and one field sergeant. (1 ER 11.)

During the course of the Sheriff Department's subsequent criminal investigation (discussed below),

---

[1] "___ ER ___" citations are to the volume and page number of Petitioners' Excerpts of Record in the Court of Appeals.

[2] The personnel on scene were the Petitioners, Deputy Gustavo Carrillo (who was a plaintiff below but not a Petitioner in this Court), a sixth deputy (Joseph Carrillo) who never brought suit, and their field supervisor, Sean Burke. (1 ER 11.)

it learned that Mr. Flores had been in the street outside of the residence that was being searched for narcotics. (4 ER 1077.) He was intoxicated and had sporadically refused to comply with the deputies' instructions to leave the area. (*Id.*) Eventually, one or two deputies pushed Mr. Flores behind a large parked truck and, without justification, struck him three times with either a baton or a flashlight: the first blow was to the back right side of Mr. Flores' head; the second blow was to the right side of his torso; and the third blow was to the center of his back. (4 ER 1077-1081.)

Mr. Flores eventually escaped his attacker and made it to a nearby payphone, where he called 911. (4 ER 1078.) Los Angeles Fire Department paramedics were dispatched to the scene, where they located Mr. Flores and began treating his injuries. (4 ER 1078.) While the paramedics were assisting Mr. Flores, one or two deputies approached the paramedics and were informed that Mr. Flores was injured and that he had accused one of the deputies of being the assailant. (2 ER 386:12-387:4.) In response, the deputies told the paramedics that they should turn Mr. Flores over to them. (*Id.*) The paramedics refused this obviously improper request, and instead transported Mr. Flores to a local hospital emergency room. (*Id.*, 4 ER 1078.)

At the hospital, Mr. Flores was examined, given a CAT scan and other tests, and treated for his injuries. (4 ER 990, 1078.) A supervisor from the Los Angeles Police Department ("LAPD") responded to the hospital because the 911 call came from a payphone near

the patrol border of the LAPD and Sheriff's Department. (2 ER 442:17-27.) When the LAPD supervisor determined that the victim was certain that his attacker was a deputy sheriff (and not an LAPD officer), the LAPD supervisor called the watch commander at the East L.A. Sheriff's Station about the assault. (2 ER 442:17-27; 4 ER 1006-1007.) Despite the Department's policy requiring all deputies to immediately report any force used or witnessed to a superior, this was the first notice the Sheriff's Department had received that one or more of its personnel has used force against Mr. Flores. (1 ER 64; 2 ER 442:17-27.)

The Department promptly initiated an internal investigation into Mr. Flores' complaint of deputy misconduct, with the Station Watch Commander and Field Sergeant responding to the hospital to interview Mr. Flores and to confirm his physical injuries. (2 ER 442:17-27, 443:1-13.) Mr. Flores was unable to identify his exact attacker, but he was able to provide a detailed description: a deputy sheriff, Hispanic, male, who was of average build, which was consistent with Petitioners and the other deputies at the scene. (1 ER 55.) One of the deputies was female, but because of her physical appearance, she could have easily been mistaken for being male, especially at nighttime. (1 ER 56.)

Based on the verified information, including the information obtained from Mr. Flores and at the scene of the assault, all of the involved personnel were informed that at the end of their regular shift,

they should remain at the Station to be interviewed by Department investigators. (1 ER 80.) This instruction was consistent with Department members' affirmative duty to cooperate with such investigations. (1 ER 80, 2 ER 427.)

Accordingly, Petitioners and the other involved personnel waited at the Station to be interviewed. While waiting, everyone socialized, spoke with other members of the Department, were repeatedly asked if they needed anything, spoke on the telephone with their counsel, prepared reports, and slept, all the while receiving overtime pay from the Department. (1 ER 13, 80-81, 2 ER 448:1-450:4.)

What started as an administrative investigation (that could lead to employee discipline) quickly changed into a criminal investigation because it became clear that what had happened was an unlawful assault with a deadly weapon. Thus, later that morning, Sergeant James Kagy of the Department's Internal Criminal Investigations Bureau came to the Station to see if anyone would provide him with a voluntary statement. (1 ER 54-56.) After all of the Petitioners spoke on the telephone with their legal counsel (who was also general counsel for the deputies' union), all of the involved personnel were briefly interviewed. (1 ER 14.) Each interview was tape recorded and lasted only a few minutes. (2 ER 356-368.) During these interviews, Petitioners were advised that they were not suspects but could not be eliminated as suspects either. (1 ER 56.) When asked if they would like to make a statement, each deputy

invoked their right to remain silent, and the interviews were promptly concluded. (2 ER 356-368.) Thus, no compelled statements were taken at this time from any of the Petitioners.

Because none of the Petitioners could be cleared of wrongdoing concerning the assault of Mr. Flores, they were removed from field assignments that allowed them to use unsupervised force against members of the public, which means that each was reassigned from patrol to Station duties pending the ongoing investigation. (1 ER 64-65; 2 ER 453:5-20.) Until each deputy could be cleared of wrongdoing, each was temporarily assigned to the Station, where they performed various duties of a law enforcement officer, such as taking 911 emergency calls, responding to requests for assistance by persons who came to the Station, and supervising inmates held at the Station jail. (1 ER 82.)

The deputies initially claimed that the temporary reassignments caused them hardships. (1 ER 82.) In response, the Station captain asked each deputy to provide him with a written memorandum setting forth the specific circumstances of his or her hardship and how it related to the reassignments, but the deputies never responded to his request. (1 ER 82; Petitioners' Appendix [hereinafter "App."] 6a.)

In the meantime, Sgt. Kagy continued his investigation. Over the following months, he interviewed various Department employees about their involvement in the incident, repeatedly interviewed various

citizen witnesses who were present at the narcotics investigation (and, therefore, could have witnessed some or all of the crime), gathered and analyzed substantial physical evidence (e.g., medical records, tapes and transcripts of radio transmissions, Department files, photographs, records of mobile digital transmissions from the subject patrol vehicles, tapes of telephone calls made to the Station), coordinated with state and federal prosecuting agencies, and responded to inquiries made by the Petitioners' legal representatives. (1 ER 57-58.)[3]

While Sgt. Kagy was investigating this matter, he was also very busy simultaneously tending to other important criminal investigations, including two major sexual assault investigations and an assault with a deadly weapons investigation. (1 ER 58.)

During the investigation, Petitioners were continuously represented by legal counsel, were allowed to keep their law enforcement powers, were allowed to work as peace officers at the Station, and received

---

[3] Petitioners asserted below that the few police reports they submitted on summary judgment showed that the Department knew long before Petitioners were reinstated that they would be cleared of wrongdoing. Petitioners' assertion was false and their argument was without merit for several reasons. For example, the District Court found that Petitioners had failed to make a proper evidentiary showing. (App. 38a-39a.) The Court of Appeals affirmed this ruling. (App. 23a.) Also, there was no foundation for Petitioners' assertion because they never submitted the entire investigation, only selected excerpts.

their usual compensation, including occasional overtime pay. (1 ER 13, 4 ER 950-963.)

In August, Sgt. Kagy completed, assembled, and submitted his investigation to prosecutors for their review and evaluation. (1 ER 58.)

In September, based on their review of the investigation, the District Attorney and United States Attorney's offices determined that the deputy who committed the felony assault against Mr. Flores was Petitioner Bardon. (1 ER 59.) Therefore, in October, they had Sgt. Kagy take compelled statements from the other deputies – Petitioners Aguilera, Arellano, and Ramirez and Deputy Carrillo – *none of whom were ever asked to and therefore ever waived their right against having such statements used against them in a later criminal proceeding*. (1 ER 59; App. 7a.) Based on the information obtained from these statements, the Petitioners and Deputy Carrillo were cleared of the investigation, and as a result they were restored to their pre-investigation assignments. (App. 7a.)

Ultimately, the prosecutors determined that based on the statements of Mr. Flores, which were corroborated by his significant physical injuries, "a crime occurred" and that "there is a strong likelihood that" Petitioner Bardon was the assailant, but they concluded "that there [was] insufficient evidence to prove beyond a reasonable doubt that Deputy Bardon committed an assault under color of authority upon Martin Flores." (4 ER 1081.) Accordingly, prosecutors

declined to file charges against Deputy Bardon. (*Id.*) As a result, Petitioner Bardon's prior job assignment was restored as well. (4 ER 453:16-20.)[4]

Thus, no criminal case was ever filed against Petitioners, nor were any compelled statements ever used against any of the Petitioners in any criminal proceeding.

## II. The Proceedings In The District Court And The Court Of Appeals.

Petitioners filed suit on September 5, 2003. (1 ER 1.) Their Complaint, which was never amended, sets forth their Fifth Amendment claim in Count Three. (1 ER 20-22.) Petitioners alleged that their rights had been violated because Respondents had purportedly retaliated against them for exercising their right to remain silent. (*Id.*) Respondents denied Petitioners' allegations. (1 ER 32-40.) Nowhere did Petitioners allege that Respondents were required by the Fifth Amendment to provide them with notice that any compelled statement could not be used against them in a criminal proceeding and that if they refused to provide such a statement they could be subject to administrative discipline. (1 ER 20-22.)

---

[4] Petitioner Bardon left the employ of the Sheriff's Department during the pendency of this litigation.

Based on the pleadings, the parties conducted discovery and, eventually, Respondents sought summary judgment. (1 ER 41.) Not surprisingly, the summary judgment papers were limited to the issues raised by the pleadings, and did not include the issue about which Petitioners now seek review. (1 ER 41-43.) After consideration of the admissible evidence and applicable law, the District Court granted Respondents' motion and dismissed Petitioners' Fifth Amendment claim on multiple grounds. (App. 62a-69a.) The District Court specifically held that, "Indeed, Plaintiffs have not cited a single case in which a Fifth Amendment violation was found in similar circumstances." (App. 83a.) Nowhere did the District Court address the issue Petitioners now seek to raise because it was never presented below. (*Id.*)

Petitioners then sought review by the Court of Appeals. In accordance with the Federal Rules of Appellate Procedure, Petitioners phrased the issue they wanted reviewed concerning the Fifth Amendment as follows: "That Plaintiffs were not unlawfully punished for exercising their rights to remain silent, as guaranteed by the 5th Amendment to the United States Constitution, by being reassigned to undesirable and inferior work assignments and positions for an unnecessarily and intentionally prolonged period of time." (Petitioners' Opening Brief, 3.)

Nowhere in their Opening Brief or in their Reply Brief did they raise the issue now posed to this Court. The Court of Appeals thereafter affirmed the judgment of the District Court on multiple grounds.

Petitioners thereafter filed their Petition, limiting their request for review as stated above, and abandoning all other issues. (Petition ["Pet."], 9.)

## REASONS FOR DENYING THE PETITION

### I. The Petition Seeks Review Of An Issue Not Raised In This Action.

There are many reasons why this Court should deny Petitioners' request for review, but the first is that it seeks review of an issue that, before now, was neither raised by the Petitioners nor litigated by the parties below.

Specifically, nowhere in Petitioners' operative Complaint did they raise the issue for which they seek review: whether the Respondents were required by the Fifth Amendment to provide them with notice that any compelled statement could not be used against them in a criminal proceeding and that if they refused to provide such a statement they could be subject to administrative discipline. Because the issue was not raised by Petitioners' pleading, it was never the subject of discovery by the parties.

For example, nowhere did the parties fully develop a record about what notice was or was not provided the Petitioners (or their legal counsel, with whom Respondents communicated), including whether they were given the notice that they now contend is constitutionally required. Petitioners pursued their

claims in the District Court for more than two years, but the parties never addressed this issue, nor obviously related issues such as if notice was provided, to whom? When? What was the substance of the notice? What was the response? Also, if no notice was provided, why? If not, did any harm result?

The foregoing explains why, in the Court of Appeals, Petitioners never raised (properly or otherwise) the issue of what notice, if any, is constitutionally required. Nowhere was the issue raised as an issue in their Opening Brief to the Court of Appeals, as required by the applicable appellate rules. *See, e.g.*, Fed. R. App. Proc., Rule 28(a)(5)-(9) (requiring an appellant's opening brief to contain a statement of the appellate issues); *Reed-Goss v. Astrue*, 2008 U.S. App. LEXIS 18205 at *4 (9th Cir. 2008) ("[the plaintiff's] claim that [the administrative law judge] failed to discuss her alleged inability to perform work on a sustained basis was not raised in the district court and is therefore waived"); *Ritchie v. United States*, 451 F.3d 1019, 1026 n. 12 (9th Cir. 2006) (argument waived because it was not raised in district court); *Butler v. Curry*, 528 F.3d 624, 642 (9th Cir. 1998) (waiver where appellant failed to raise issue either in the district court or in opening brief, but instead raised issue for first time at oral argument); *Northwest Acceptance Corp. v. Lynnwood Equipment, Inc.*, 841 F.2d 918, 923 (9th Cir. 1988) (citing Fed. R. App. Proc., Rule 28). Also, nowhere was the issue discussed in the body of Petitioners' Opening Brief or in their Reply Brief.

Instead, the issue about which Petitioners now seek review was raised for the very first time by the judge who dissented from the Panel's ruling (App. 30a), which was only briefly responded to by the majority in a footnote. (App. 19a-20a.) This is certainly not the manner in which purportedly important issues of law can or should be brought to this Court for adjudication. The Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure set forth how litigants can and must raise issues and claims for resolution by the federal courts, and failure to do so deems the matter waived. The long-standing case law of this Court is in accord. *See, e.g., Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 169, 125 S.Ct. 577, 585 (2004) ("We ordinarily do not decide in the first instance issues not decided below."); *Adarand Constructors, Inc. v. Mineta,* 534 U.S. 103, 109, 122 S.Ct. 511 (2001) *(per curiam)*; *United States v. Mendenhall,* 446 U.S. 544, 551-552, n. 5, 100 S.Ct. 1870 (1980); *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212-213, 118 S.Ct. 1952, 1956 (1998) ("Petitioners raise this question in their brief . . . but it was addressed by neither the District Court nor the Court of Appeals. . . . 'Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.'") (quoting *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 147, n. 2, 90 S.Ct. 1598, 1602, n. 2 (1970)); *Dothard v. Rawlinson,* 433 U.S. 321, 323, n. 1, 97 S.Ct. 2720, 2724, n. 1 (1977) (holding that a constitutional issue is not properly before this Court where the issue had not been raised

in the district court); *Travelers Cas. & Sur. Co. of America v. Pacific Gas & Elec. Co.*, ___ U.S. ___, 127 S.Ct. 1199, 1207 (2007) ("In any event, we ordinarily do not consider claims that were neither raised nor addressed below . . . and PG & E has failed to identify any circumstances that would warrant an exception to that rule in this case. We therefore will not consider these arguments.").

Here, Petitioners have not properly presented – below or to this Court – the issue about which they now seek review. The record, factually or legally, was never developed in the District Court. When seeking review by this Court, Petitioners have the important affirmative duty to show that they have satisfied all of the procedural and substantive prerequisites necessary for review. Here, Petitioners have not met this fundamental burden.

## II. This Court Declined To Review This Issue Last Term.

Last term, this Court declined to review a First Circuit decision in which no Fifth Amendment violation was found where the plaintiff was charged with failure to cooperate after he and his attorneys were advised that he did not face criminal prosecution, and yet the plaintiff did not answer questions during an administrative investigation. *Sher v. U.S. Department of Veterans Affairs*, 488 F.3d 489 (1st Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S.Ct. 1924 (2008). The dissenting opinion in *Sher* called for the adoption of a

rule that a government employer is required to advise an employee of his rights and obligations before he can be disciplined for maintaining his silence – as did the dissenting opinion below. *Id.* at 509-513.

No significant legal developments have occurred since this Court denied the Petition for a Writ of *Certiorari* in *Sher*. Accordingly, this Petition should be denied for this reason alone.

## III. The Petitioners Were Not Punished For Exercising Their Fifth Amendment Rights.

Another reason to deny the Petition is that it is based on a faulty premise: that Petitioners were punished for exercising their Fifth Amendment rights. Petitioners' assertion was properly rejected by both the District Court and the Court of Appeals.

First, the undisputed evidence was that Petitioners and the other employees were temporarily reassigned until they could be cleared of wrongdoing, regardless of whether they gave the Department a statement or not. (1 ER 64:1-8, 65:14-25.) Also, the intent was never to punish any of the involved employees, but to protect the public, the deputies, and the Department. (1 ER 82:22-28.)

Second, Petitioners never proved with admissible evidence their unsubstantiated claims of "punishment." For example, with respect to the Station

captain who Petitioner Aguilera believed (without any foundation whatsoever)[5] had wrongfully denied her promotions because of the investigation, he offered undisputed testimony that he did not even know of any promotional opportunities for her, much less curtail them. (4 ER 896:2-21.) Also, in response to Petitioner Aguilera's vague claim that she was denied overtime, she was presented with (and never responded to) her own payroll records reflecting her receipt of overtime during the investigation. (4 ER 950-963.)

That is why, after fully reviewing the extensive record, the Court of Appeals agreed "with the district court's observation that the supervisors' actions in this case 'w[ere] [not] done to punish [the deputies] for asserting their constitutional rights.'" (App. 21a.)

Petitioners failed to submit to the District Court admissible evidence to support their false assertion that their temporary job reassignments were in retaliation for their exercising their Fifth Amendment rights. To the contrary, the undisputed admissible evidence was that the Station supervisors who made the decision to temporarily reassign Petitioners: 1) were different than and outside the chain of command of the ICIB supervisors who controlled the

---

[5] In support of their assertion, Petitioners cite their pleading (which is irrelevant for summary judgment purposes) and a declaration containing assertions with no specifics or foundation. (Pet. 5 n. 3.)

criminal investigation (1 ER 59:15-20, 64-66, 71:14-20, 81-82); 2) they did not order the reassignment with the intent to punish Petitioners or to compel any unimmunized statements (3 ER 893:7-10); 3) they did not believe that the temporary reassignments would cause the Petitioners to provide unimmunized statements; 4) they believed it would be wrong to obtain statements from Petitioners in violation of the deputies' Fifth Amendment rights (2 ER 396:1-397:21); and 5) they implemented the temporary reassignments – even though it imposed a burden on the Department – because they believed that it was in the best interests of the public, the deputies, and the Department. (3 ER 892:8-893:6; 1 ER 64:1-66:2, 81:22-82:21.)

The prudence and constitutionality of Petitioners' temporary reassignments are illustrated by the analogous facts and instructive analysis in *Dwan v. City of Boston*, 329 F.3d 275 (1st Cir. 2003). In *Dwan*, an African-American undercover police officer was beaten by other police officers during a foot pursuit of robbery suspects. The plaintiff police officer initially prepared a written statement regarding his conduct during the incident, and as the investigation continued, he was called before a federal grand jury on two occasions. The plaintiff was *not* granted immunity, and he invoked his right against self-incrimination. *Id.* at 277. The plaintiff was subsequently placed on administrative leave for 18 months for the "'efficiency of the department,'" during which time he received his regular salary but could not work overtime or

special assignments. *Id.* After the plaintiff was reinstated upon passing the second of two polygraph examinations, the plaintiff sued, claiming in part that the defendants' actions violated his Fifth Amendment rights. *Id.* at 278. The district court denied defendants summary judgment as to this claim, and on appeal, the First Circuit reversed.

For purposes of the appeal, it was assumed that "the administrative leave decision was prompted at least in part by [the plaintiff]'s action in taking the Fifth Amendment and not solely by an unrelated determination that he should be investigated internally for misconduct." *Id.* at 279. Nevertheless, the First Circuit explained that administrative actions taken after the invocation of the Fifth Amendment are not necessarily impermissible and reached a finding that is highly relevant here:

> Given the objective circumstances of this case, we see nothing unreasonable about the actions taken by the defendants. It is beyond dispute in this case that unidentified policemen on the scene badly beat a black undercover police officer, mistakenly believing him to have shot another policeman, and it is almost certain that *some* of the other officers present knew who had done it, denied having knowledge, and supported each other's stories. . . . [¶] [The plaintiff] may or may not have had such knowledge. But what the defendants knew was that he had told a story

> as to why he did not see what happened. . . . and [the plaintiff] then declined to testify about the matter before a grand jury without immunity. On this basis, the defendants were perfectly entitled to begin an investigation into whether [the plaintiff]'s original claims constituted false reporting and other violations of departmental regulations. [¶] *Nor was there anything unreasonable in placing him on administrative leave with pay pending this investigation even though this meant he was not eligible for extra duty which would have meant more pay. Administrative leave, for one reasonably suspected of serious misconduct, is a routine measure – here mitigated by continued pay. That [the plaintiff] suffered some disadvantage . . . does not make it a constitutional violation.*

*Id.* at 280 (latter emphasis added). Moreover, the First Circuit held that even if the defendants had hoped that the plaintiff would waive his right against self-incrimination, that hope did not render the placement of the plaintiff on administrative leave unconstitutional. *Id.* at 281.

Just as the plaintiff in *Dwan* was not "punished" within the meaning of the Fifth Amendment, when he was placed on administrative leave for 18 months pending the outcome of the internal investigation, Petitioners were not punished when they were temporarily assigned to Station duty. The same legitimate

concerns that justified the challenged action in *Dwan* also justified the challenged action here.[6]

Thus, since Petitioners were never punished for exercising their Fifth Amendment rights, this case does not fall within the issue about which Petitioners seek review. Accordingly, the Petition should be denied.

## IV. The Decision Below Is Consistent With This Court's Jurisprudence And Does Not Create An Inter-Circuit Conflict That Warrants Review.

### A. The Court Of Appeals Correctly Held That Petitioners' Fifth Amendment Rights Were Not Violated.

In a trilogy of cases published over 40 years ago, this Court established that public employees are entitled to the Fifth Amendment's right against self-incrimination and that public employees cannot be discharged for having refused to waive this right. *Garrity v. State of New Jersey*, 385 U.S. 493, 87 S.Ct. 616 (1967); *Gardner v. Broderick*, 392 U.S. 273, 88 S.Ct. 1913 (1968); *Uniformed Sanitation Men*

---

[6] The First Circuit also struck down the contention that denial of overtime pay can constitute actionable punishment by eliciting the example of a state-employed cashier who refuses to discuss money missing from the treasury: "surely it would not be a civil rights violation to put the cashier on administrative leave pending investigation merely because the cashier would forego overtime pay." *Id.* at 280.

*Association, Inc. v. Commissioner of the City of New York*, 392 U.S. 280, 88 S.Ct. 1917 (1968). At the same time, this Court balanced these interests against the public employer's interest in investigating wrongful conduct by clarifying that if an employee refuses to "answer questions specifically, directly, and narrowly relating to the performance of his official duties, *without being required to waive his immunity*, with respect to the use of his answers or fruits thereof in a criminal prosecution of himself," the right against self-incrimination would not bar the employee's dismissal. *Gardner*, 392 U.S. at 278 (emphasis added); *see also*, *Uniformed Sanitation Men*, 392 U.S. at 284.

Over the last four decades, these holdings have been consistently applied to mean that a public employee may be required to provide a statement regarding his job performance as long as that statement is not used against him in a criminal proceeding. The dynamics of this employment equation – the "compelling" of a statement – has surely lost whatever novelty that it may have once had, and public employees (especially in the law enforcement setting) have long since become familiar with its application. Simply put, employers and employees alike are well aware that when a statement is "compelled," that statement is off limits for purposes of criminal prosecution.

These well-established principles could not have been violated in the instant case simply because they were not triggered until three of the four Petitioners

provided compelled statements in October 2004. Indeed, it was undisputed that when Petitioners were initially questioned in September 2003 about their actions, no effort was made to obtain a "compelled" statement from them and that they were permitted to exercise their right against self-incrimination. (2 ER 356-368.) As the Court of Appeals held, "the supervisors did not violate the deputies' Fifth Amendment rights when they were questioned about possible misconduct, *given that they were not compelled to answer the investigator's* questions, or *to waive their immunity from self-incrimination.*" (App. 21a; emphasis added.)

Thus, Petitioners were never placed in the position of having to relinquish their Fifth Amendment rights to save their jobs (unlike the employees in *Gardner* and *Uniformed Sanitation Men*), and consequently, the Court of Appeals correctly further held that Petitioners' "Fifth Amendment right against self-incrimination was not implicated by the supervisors' conduct." (App. 19a (citing *Hill v. Johnson*, 160 F.3d 469, 471 (8th Cir. 1998) ("[t]he Fifth Amendment is violated only by the combined risks of both compelling the employee to answer incriminating questions and compelling the employee to waive immunity from the use of those answers"); *Wiley v. Mayor & City Council of Baltimore*, 48 F.3d 773, 777 (4th Cir. 1995) (no Fifth Amendment violation where the officers were not asked to waive their privilege against self-incrimination and were asked job-related questions)).

The soundness of the Court of Appeals' reasoning and holding is evidenced by the fact that Petitioners do not challenge its finding that the absence of a compelled statement, along with the absence of the waiver of the *Garrity* immunity, raises no Fifth Amendment concerns. Instead, Petitioners seek review of an issue that was not properly raised below (as discussed *supra*) – that the Court of Appeals' narrow holding somehow creates or exacerbates an allegedly dramatic inter-circuit conflict regarding whether an employee must be advised of the employment consequences of refusing to provide an *immunized* (i.e., compelled) statement.

Petitioners' attempt to seek review to address this purportedly important issue should be denied. The Court of Appeals' holding (based on circumstances that *did not* involve any attempt to compel an immunized statement) does not create any conflict with the few cases since *Garrity* that have addressed whether the taking of a compelled statement imposes a duty to advise the employee of the possible administrative consequences of refusing to provide a statement.

### B. The Court Of Appeals' Proper Application Of Controlling Precedent And Its Narrowly-Crafted Holding Did Not Create Or Broaden Any Material Inter-Circuit Conflict.

Petitioners glean from the holdings and dicta of a mere handful of cases a purported Fifth

Amendment requirement on which they seek to impart constitutional significance of the highest order. Without this requirement – that a government employer seeking a compelled (and therefore immunized) statement from an employee must first warn him or her that because of the attached immunity, the employee must cooperate or face administrative discipline – Petitioners contend that prosecutorial and administrative anarchy will ensue, with a heightened and disproportionate impact on the ability of law enforcement agencies to protect the public trust, to safeguard the integrity of criminal prosecutions, and to weed out rogue officers.[7] (*See* Pet. 30-33.)

Petitioners' overarching contention that the decision below somehow exacerbates an irreconcilable and "deeply entrenched" conflict regarding their proposed "*Garrity* notice" rule is undone by the fact that this rule could and would only come into play when a public employer is intent on *compelling* an employee to provide an immunized statement. As Petitioners state, there are questions about how to "protect employees' Fifth Amendment rights sufficiently to permit a public employer *to compel testimony* (or punish employees who refuse to testify)." (Pet. 7.) Simply put, the new rule Petitioners seek would only be triggered when a public employee is

---

[7] As explained in Section V, *infra*, Petitioners do not present any concrete evidence of these dire consequences – consequences that seemingly should be arising everyday in each Circuit that has not adopted Petitioners' proposed "*Garrity* notice" rule.

asked to provide a compelled and immunized statement – conversely, when *no such request is made*, as in the instant case, this proposed rule would have no relevance. Accordingly, the Court of Appeals' holding – which was based on circumstances devoid of the compulsion of any statement under *Garrity* – cannot be treated as having created any meaningful conflict with the cases upon which Petitioners rely.

Indeed, Petitioners discuss cases that, without exception, involve situations where public employers sought immunized statements from their employees, and it was in this context that these courts examined the question of whether the employer should be required to advise employees of the adverse employment consequences of their refusal to provide the immunized statement. For example, in *Modrowski v. Dep't of Veterans Affairs*, 252 F.3d 1344 (Fed. Cir. 2001), the plaintiff challenged the Merit Systems Protection Board's decision to affirm the Department of Veteran Affairs' decision to remove him from federal service. *Id.* at 1346. The plaintiff had been employed as a realty specialist and was investigated for possible criminal activity and questionable realty transactions. When the plaintiff appeared before the Board with his union representative, he refused to answer any questions, invoking the Fifth Amendment. *Id.* at 1347.

Subsequently, the plaintiff was notified in writing that the U.S. Attorney had *granted him immunity*, that he would not be prosecuted, and that he

was therefore required to respond to the investigator's questions. *Id.* at 1347. The plaintiff then indicated that he would not respond until he was able to consult with an attorney. *Id.* at 1348. The investigator responded by sending the plaintiff a letter proposing that he would be removed from his position, based on charges related to the realty transactions and refusal to cooperate during the investigative proceeding. The proposed actions were subsequently taken, and the plaintiff appealed. *Id.*

In addressing the propriety of the refusal to cooperate charges, the Federal Circuit addressed the plaintiff's contention that "he had a legitimate basis for refusing to answer the questions until he had time to meet with his attorney" because "he was unclear about the scope of any immunity" that had been provided to him. *Id.* at 1350. It was in this particular context that the Federal Circuit summarized the holdings of *Garrity* and *Gardner* and stated that the "[i]nvocation of the *Garrity* rule for *compelling answers* to pertinent questions about the performance of an employee's duties is adequately accomplished when that employee is *duly advised of his options to answer* under any immunity actually granted or remain silent and face dismissal." *Id.* at 1351 (emphasis added) (citing *Weston v. Dep't of Hous. & Urban Dev.*, 724 F.2d 943, 948 (Fed. Cir. 1983)). The Federal Circuit held that the plaintiff had not been afforded a meaningful opportunity to be advised of his options because his request to meet with his attorney had not been accommodated. The Board's

decision to sustain the charges regarding the plaintiff's refusal to cooperate with the investigation was therefore reversed. *Id.* at 1353.[8]

Thus, Petitioners' suggestion that the Federal Circuit has established a rule in direct conflict with the holding below is false; the Federal Circuit's analysis is strictly limited to cases where an employee has been assured that his answers will not be used against him in a criminal proceeding, i.e., that his statement will be immunized. This, however, was not the case below because "when [Petitioners] were questioned about possible misconduct, . . . [they] were *not compelled to answer* [Sergeant Kagy]'s questions. . . ." (App. 18a.) In the absence of this key element of the *Garrity*-based Fifth Amendment construct, the Court of Appeals could not and did not reach a holding that conflicts with the Federal

---

[8] The Federal Circuit also distinguished this case from *Weston* – where there also had been no ambiguity as to the declination to prosecute and where the employee had access to counsel. *Id.* In *Weston*, the plaintiff was advised that "the United States attorney has declined criminal prosecution of you . . . This is purely and administrative inquiry . . . your failure to answer relevant and material questions, as they relate to your official duties, may cause you to be subjected to disciplinary action. . . ." 724 F.3d 946. The *Weston* Court explained that this notice adequately invoked the *Garrity* rule for "*compelling* answers", and that an employee could not refuse to answer pertinent questions after having been "assured of protection against use of his answers or their fruits in any criminal prosecution. . . . " *Id.* at 948.

Circuit, or the few other cases upon which Petitioners rely.

Petitioners also point to the Seventh Circuit as a basis for their proposed expansion of the *Garrity* rule, and the most noteworthy case is *Atwell v. Lisle Park District*, 286 F.3d 987 (7th Cir. 2002). In *Atwell*, the plaintiff was investigated for financial improprieties and was advised by her counsel to not meet with her employer's investigator. *Id.* at 989. The plaintiff was subsequently *terminated* for insubordination in failing to cooperate in the investigation. *Id.* The Seventh Circuit explained that it had a "*unique*" rule requiring a public employer "who wants to ask an employee potentially incriminating questions [to] first *warn* him that because of the immunity to which the cases entitle him," that "he may not refuse to answer the questions on the ground that the answers may incriminate him." *Id.* at 990. Nevertheless, the Seventh Circuit held that this rule had not been violated because the plaintiff did not come to the meting at which she would have been warned "that if she refused to answer the question[s] . . . the Fifth Amendment would not protect her from being fired for refusing to cooperate in the investigation." *Id.* at 991.

Not surprisingly, Petitioners fail to acknowledge the Seventh Circuit's characterization of its rule as "unique" – a description that, at the very least, illustrates the exaggerated nature of Petitioners'

contention regarding the magnitude to which their proposed rule has been adopted.[9]

Finally, Petitioners rely on dicta from the opinion on remand in *Uniformed Sanitation Men Association, Inc. v. Commissioner of Sanitation of the City of New York*, 426 F.2d 619 (2d Cir. 1970). In *Sanitation Men*, 15 city sanitation employees were originally terminated for having refused to sign waivers of their Fifth Amendment immunity and refusing to testify before a grand jury. This Court reversed, and on remand, the plaintiffs were reinstated, and were called to appear at a departmental inquiry. *Id.* at 621. The plaintiffs were advised of their right against self-incrimination; that their statements could not be used against them in a criminal proceeding; and that if they did not answer material and relevant questions, they could be subject to disciplinary action. *Id.* After the plaintiffs invoked their right against self-incrimination and declined to answer questions, they were *terminated* – an action that the Seventh Circuit held to be constitutionally valid under *Garrity*. *Id.* at 622, 627. Thus, *Uniformed Sanitation Men*, on remand, is also categorically distinguishable from the instant case

---

[9] The Seventh Circuit also questioned whether this rule should have any "possible application when the employee has a lawyer. . . ." *Id.* at 991. This comment has significance in the instant case since Petitioners conferred with their counsel immediately prior to being interviewed by Sgt. Kagy, as well as had legal representation throughout the investigation, and they therefore had ample opportunity to be advised of their constitutional rights. (1 ER 14:1-5; 2 ER 448:11-18.)

where Petitioners were not asked to provide immunized and compelled statements, and were not subject to anything close to the kind of job action imposed against the plaintiffs in *Uniformed Sanitation Men*, *Atwell*, and *Modrowski*.

The few cases upon which Petitioners place so much weight, and the decision below, therefore, do not represent opposite sides of any significant constitutional rift that requires this Court's attention. The Court of Appeals' holding was grounded on a factual scenario fundamentally different from those factual scenarios in these other cases.[10] Because Petitioners were not compelled to provide immunized statements during the relevant time period, the question of whether they should have been warned about the consequences of not providing immunized statements was not and could not have been litigated below. Concomitantly, Petitioners did not face termination or similar disciplinary action for declining to provide voluntary statements to Sgt. Kagy. These key factual distinctions clearly demonstrate the invalidity of Petitioners' contention that the decision below creates an irreconcilable conflict with the few cases where aspects of their proposed notice rule were addressed. Therefore, because the decision below neither creates nor broadens any inter-circuit conflict, this Petition should be denied.

---

[10] The same is true for the few state court cases cited by Petitioners.

## V. Petitioners' Contention That There Is Rampant Confusion About Applying *Garrity* Is Patently Untrue And Contradicted By Four Decades Of Case Law.

If the Petition and the Amici briefs are to be believed, then with respect to *Garrity*, the proverbial sky is falling. Common sense and four decades of experience prove otherwise.

### A. Petitioners Have Made Absolutely No Showing That Law Enforcement Officers Who Have Engaged In Criminal Activity Are Escaping Prosecution Because Of Any Purported Confusion Caused By *Garrity*.

Petitioners assert that review by this Court is necessary or police misconduct investigations will be jeopardized by investigators mistakenly taking compelled statements from officers who otherwise would have been prosecuted. (Pet. 31.) Notably absent from the Petition and the two Amicus briefs is a citation to even one case where such a scenario occurred. Petitioners' failure to cite to even one case – much less a litany – is proof that there is no problem that requires this Court's intervention.

Petitioners also broadly contend that their proposed *Garrity* notice rule is needed so that "investigators do not inadvertently interfere with prosecutorial interests" by erroneously taking immunized statements. (Pet. 31.) It is unclear exactly (or even

generally) how adopting their proposed rule would prevent investigators from inadvertently compelling statements from criminal suspects. Indeed, their proposed rule would only come into play *after* the decision to compel an immunized statement has been made since the advisement of rights required by their proposed rule would have no relevance when the employer had no intention of compelling a statement from an employee.

### B. Review Is Not Needed To Cure Any Purported Confusion About *Garrity*, As Evidenced By 40 Years Of Case Law And The Lack Of Amicus Support By Agencies Who Prosecute Law Enforcement Officers.

If there truly existed any confusion over *Garrity*, then Petitioners would have cited many cases from every Circuit that would have been authored during the last 40 years. They have not, because they cannot, and instead rely upon a few cases that, when examined closely, have nothing to do with the facts presented in this case.

Another telltale sign that Petitioners' assertion that there exists some kind of widespread confusion about how to apply *Garrity* is without merit is who are *not* seeking review by this Court. If Petitioners' assertion were true, then legions of law enforcement agencies, inspectors general, and other police misconduct watchdog groups would be advocating review,

asking for guidance about how to apply *Garrity*. But they are not.

Indeed, the reason entities and organizations that investigate and prosecute police misconduct have not joined in Petitioners' request for review and that many lower court opinions have not suggested review of the issue now presented by Petitioners is that, contrary to the assertions by Petitioners and Amici, there is no confusion (widespread or otherwise) about *Garrity*. Therefore, further guidance by this Court is not necessary.

### C. There Is No Compelling Need For This Court To Write Into The Constitution A New Rule, Especially One That Could Have Dire Consequences.

The truth is, Petitioners and the few labor unions (and their general counsel) who submitted both Amicus briefs want review by this Court so that they may obtain something unprecedented: an opinion by this Court that writes into the United States Constitution an affirmative duty by a public employer to give employees suspected of wrongdoing immunity from criminal prosecution before their job conditions can be altered pending the investigation. No such duty by the employer or right of the employee is supported (much less compelled) by this Court's precedent, the Opinion in this matter, or the law of other Circuits.

In fact, in addition to being without precedent, any such rule would defy common sense and could actually lead to absurd, even tragic results. For example, assume that a law enforcement agency that provides police services to a preschool receives credible information that one of the six law enforcement personnel assigned to the school has molested one of the children. All of the employees were present when the crime occurred, had the opportunity to commit the crime, and fit the description given by the child victim. Obviously, the law enforcement agency would (and should) temporarily remove the suspected employees from the preschool while they investigated the crime and cleared each employee of wrongdoing.

However, under the new constitutional rule proposed by Petitioners, each employee would have a constitutional right to continue working at the preschool (where additional children could be victimized) unless and until the employing law enforcement agency granted them immunity from criminal prosecution and took their compelled statements. That is not, nor should it be, the law.

## CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

PAUL B. BEACH
*Counsel of Record*
JIN S. CHOI
LAWRENCE BEACH ALLEN & CHOI, PC
100 West Broadway, Suite 1200
Glendale, California 91210-1219
Telephone (818) 545-1925